



European Network Against Racism

Réseau européen contre le racisme

Family reunification of third-country nationals

Comments of the European Network Against Racism regarding the Green Paper on the right to family reunification of third-country nationals living in the European Union

On promoting the rights of the family and the right to mobility

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The European Network against Racism (ENAR) is a network of some 700 NGOs working to combat racism in all EU Member States. ENAR is determined to fight racism, racial discrimination, xenophobia and related intolerance, to promote equality of treatment between EU citizens and third country nationals, and to link local/regional/national and European initiatives.

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1. Introduction

On 15th November 2011, the European Commission launched a public Consultation on the Green Paper on the right to family reunification of third-country nationals living in the European Union. This Consultation and the dialogue that will take place in the coming months is an important opportunity to influence the way in which the European Union approaches family reunification of migrants. Depending on the outcome of the Consultation, the Commission will decide whether any policy follow-up is necessary. The Directive may be reopened and/or amended, or left as is. As a network concerned with the rights of all ethnic minority and migrant communities in the European Union, the European Network Against Racism (ENAR) is compelled to respond critically to emerging trends related to family reunification rights and to warn of the varying agendas at work with this Consultation.

First, the focus of this Consultation is on third-country nationals, highlighting the unequal mobility rights accorded to EU citizens and those denied (or restricted to) third country nationals. This, on principle, is already discriminatory and unfair. Secondly, some Member States are resisting “open” family reunification schemes and seek instead to impose restrictions according to age, duration of residence, income levels of the sponsor, so-called integration measures and pre-entry tests, and by imposing long waiting periods as a way of discouraging applicants. Claims are also being made of migrants abusing the Directive, taking part in “forced” or “sham” marriages, and lacking the will to integrate or to conform to European cultural values. Those making these claims aim to curb migration entries to Europe.

Reopening the Family Reunification Directive¹ may result in tighter restrictions and harsher conditions, to the detriment of migrants. Considering the current political climate, with some Member States, like Denmark, attempting to use the Consultation to reverse progress made on family reunification rights and to reduce migration by 50 per cent, ENAR members and partners are called on to convey their concerns regarding the Directive.

ENAR believes the narrative on family reunification, endorsed by conservative politicians and the media, is inaccurate. Eurostat shows a drop of about 0.2 million residence permits granted in 2008 to non-EU citizens compared with 2009.² Furthermore, the number of permits issued for family reasons fell between 2008 and 2009 (–26,000), and more children than adults entered Europe under the Family Reunification Directive than did spouses.³ The rise in fears about new waves of migrants flocking to Europe for purposes of family reunification is thus unwarranted. ENAR believes that most individuals involved in family reunification schemes wish mainly to unite with their family members, to contribute to the host society, and to enjoy the possibilities available to them there.

The launch by the European Commission of the Consultation is a tool by which to review the Family Reunification Directive. Precisely because of the different agendas of the Member

¹ The Family Reunification Directive, [Accessed 18.1.2012] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:EN:PDF>

² Eurostat Statistics in Focus, 43/2011 [Accessed 18.1.2012] http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-043/EN/KS-SF-11-043-EN.PDF

³ Eurostat Statistics in Focus, 43/2011 [Accessed 18.1.2012] http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-043/EN/KS-SF-11-043-EN.PDF

States - with many hoping to reopen the Directive in order to impose even tighter restrictions on family reunification - **ENAR calls on its members and partners to influence this process by encouraging the EU to enforce current provisions rather than reopen legislative negotiations.** ENAR encourages compliance with the Charter of Fundamental Rights, in particular respect for the principle of non-discrimination, the private and family life, the right to marry, and the rights of the child. These rules and regulations need to be upheld under the Family Reunification Directive. For this, lobbying activities are needed.

Please send your response (in any format) by 1 March 2012 per email to:

➤ HOME-family-reunification-green-paper@ec.europa.eu

Or per mail to:

➤ Immigration and Integration Unit, Green Paper on Family reunification, Directorate General Home Affairs, European Commission, 1049 Brussels, Belgium.

Contributions will be published on the web portal 'Your Voice in Europe'.

This document provides ENAR's stance on these questions with a description of the political background behind the inquiries.

2. ENAR's responses to the questions posed in the Green Paper

In response to the questions raised in the Green Paper and related to the right to family life, ENAR draws from its progressive narrative on equality and diversity to formulate responses. The question that underscores all of this is **how the Directive affects family life and equality for all?**

Q1: Are the criteria (reasonable prospect for the right of permanent residence at the time of application as regulated in Article 3 and a waiting period until reunification can actually take place as regulated in Article 8), detailing who can apply as a sponsor as well as the waiting period set with the Directive the correct approach and the best way to qualify sponsors?

ENAR questions how the "reasonable prospect" of obtaining a right to permanent residence will be defined. We worry that the margin of interpretation left open to the Member States will result in denying any Third Country National the option to be a sponsor for a family member abroad.

In some Member States, the sponsor must have already resided in the country for two years to be eligible to apply as a sponsor to host a family member under the Directive. ENAR questions the hidden motives behind such a requirement, as this serves mainly to monitor the behaviours and economic capacities of the sponsor. This forces a politically constructed division in both time and space between family members and is viewed as an infringement on the right to private and family life as established in Article 8 of the European Convention

on Human Rights (ECHR),⁴ the right to marry, and the principle of non-discrimination. The length of the procedure and waiting periods must be shortened.

Q2: Under the Directive, eligibility applies to the sponsor's spouse and minor children. The question is whether it is legitimate to have a minimum age (of 21 years) for the spouse, particularly when this minimum age may differ from the age of majority in a particular Member State? The intention with raising the minimum age from 18 to 21 is to prevent forced marriages within the context of family reunification. But first hard evidence, including statistics, should be brought forward showing proof of forced marriages. Is there truly a problem of forced marriages related to the rules on family reunification or is this a tactic by Member States to impose restrictive entry rights? Would requiring a different minimum age than the age of majority help in hindering forced marriages? Are there other ways of preventing forced marriages within the context of family reunification and if yes, what? Please provide information about the situation in your Member State on this issue?

ENAR does not think that raising the age limit will have any impact on forced marriages nor is there enough evidence to show the reality of there being forced marriages.

Q3: Do you see an interest in maintaining those standstill clauses which are not used by Member States, such as the one concerning children older than 15?

The standstill clause requires that children over 15 years of age must enter the Member State under a different legal scope than through family reunification in an attempt to limit forced marriages. Austria is currently the only Member State with a standstill clause. While Germany and the Netherlands see this as *lawful*, the UK court says it is *unlawful*.⁵ The EU asks you what you believe. ENAR encourages you to discourage maintaining unlawful standstill clauses, particularly if a government cannot prove that a forced marriage is taking place. The use of standstill clauses, such as this, is using a sledgehammer to curb a problem without knowing the actual size of the problem.

Q4: Are the rules on eligible family members adequate and broad enough to take into account the different definitions of family existing other than that of the nuclear family?

Different eligibility rights apply in the Member States due to varying understandings of the family makeup. There is a "may" clause in place, which allows Member States the right to decide for themselves the meaning of the family makeup. Member States commonly authorize the entry and residence to the "nuclear" family, which includes the sponsor's spouse and minor children of the spouse or sponsor. More than half of the Member States, however, also include parents of the sponsor and/or his/her spouse, not just the children. National law on same sex marriages also apply under this Directive. ENAR thus encourages those Member States with the more limited scope of nuclear family to widen their understanding of nuclear family to include the parents of the sponsor, and to authorize entry rights and residence for same sex marriages. Furthermore, in some Member States nationals benefit from more favourable conditions than third-country nationals.

⁴ http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf

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Q5: Do the integration measures efficiently serve the purpose of integration? How can this be assessed in practice? Which integration measures are most effective in that respect? Would you consider it useful to further define these measures at EU level? Would you recommend pre-entry measures? If so, how can safeguards be introduced in order to ensure that they do not *de facto* lead to undue barriers for family reunification (such as disproportionate fees or requirements) and take into account individual abilities, such as age, literacy, physical ability, educational level?

Integration measures have increasingly been used by Member States as preconditions for admission to a Member State. Some Member States require tests on language and on knowledge of the destination country before even leaving their country of origin to be eligible for family reunification. Some Member States require a written obligation that the individual will complete civic and language classes upon entry in the destination country. The Commission asserts: “The admissibility of integration measures – as stated already in the evaluation report – should depend on whether they serve the purpose of *facilitating* integration and whether they respect the principles of proportionality and of subsidiarity. Decisions on the application for family reunification in relation to passing tests should take into account whether there are available facilities (translated materials, courses) to prepare for them and whether they are accessible (location, fees). Specific individual circumstances (such as proven illiteracy, medical conditions) should also be taken into account”⁶ These integration measures are supposed to prove the willingness of an individual to integrate. But the tests applied have to be *able to test this willingness* and be adapted to the different circumstances of each individual. A person who is illiterate should not just be denied the option to emigrate for purposes of family reunification due to a lack of appropriate testing methods. Furthermore, the right to family should not be denied due to a failure to meet the integration measures. Imposing high costs associated with these tests effectively prevents poor migrants from possibilities of reunifying with family members abroad. Furthermore, the income amount required of sponsors is in some Member States higher than the amount of social assistance allotted to nationals in need. The right to protection from discrimination should be ensured. ENAR also reminds that all pre-entry tests go against the Directive on Family Reunification, which should have an equal treatment position.

Q6: In view of its application, is it necessary and justified to keep such a derogation in the Directive to provide for a three year waiting period as from the submission of the application?

Why should family reunification rights be limited based on the length of the sponsor’s residence permit? Only Austria uses this standstill clause related to the expiry date of the sponsor’s residence permit. ENAR questions the fairness in imposing disproportionate family reunification rights on different groups, depending on their purposes of stay and their countries of origin. Consider as well differentiations in the rules for American business people, who do not need to have resided at least one year prior to reunifying with his/her spouse. ENAR reminds of the principle of non-discrimination.

⁶ Green Paper on the right to family reunification of third-country nationals living in the European Union, [Accessed 18.1.2012] http://ec.europa.eu/home-affairs/news/consulting_public/0023/2_EN_ACT_part1_v8.pdf

Q7: Should specific rules foresee the situation when the remaining validity of the sponsor's residence permit is less than one year, but to be renewed?

ENAR ponders whether this should be specifically open and turned into a right for refugees.

Q8: Should the family reunification of third country nationals who are beneficiaries of subsidiary protection be subject to the rules of the Family reunification Directive? Should beneficiaries of subsidiary protection benefit from the more favourable rules of the Family reunification Directive which exempt refugees from meeting certain requirements (accommodation, sickness insurance, and stable and regular resources)?

The Commission suggests that refugees encounter practical difficulties (i.e. problems maintaining contact to family members left in the country of origin), which is linked to their specific situation as refugees. This, it is argued, is of a different nature than those faced by third country nationals, but the family relationship should be the state's business.

Q9: Should Member States continue to have the possibility to limit the application of the more favourable provisions of the Directive to refugees whose family relationships predate their entry to the territory of a Member State? Should family reunification be ensured for wider categories of family members who are dependent on the refugees, if so to which degree? Should refugees continue to be required to provide evidence that they fulfil the requirements regarding accommodation, sickness insurance and resources if the application for family reunification is not submitted within a period of three months after granting the refugee status?

ENAR does not push to *reopen* the Directive because on this issue the rights accorded to refugees are more inclusive in the Directive than they may potentially be if we proposed changes here. Member States do provide access to beneficiaries of subsidiary protection. *Amending* the Directive to encourage more court cases and infringement procedures against inconsistent Member States would, however, be welcome.

Q10: Do you have clear evidence of problems of fraud? How big is the problem (statistics)? Do you think rules on interviews and investigations, including DNA testing, can be instrumental to solve them? Would you consider it useful to regulate more specifically these interviews or investigations at EU level? If so, which type of rules would you consider?

These questions essentially ask how DNA testing should be carried out in practice. Conditions in the country of origin play a role. DNA testing should be free and if a fee is incurred, it should not be more than 200€. This allows them better conditions. If you allowed these rights there would be no need for bogus marriages.

Q11: Do you have clear evidence of problems of marriages of convenience? Do you have statistics of such marriages (if detected)? Are they related to the rules of the Directive? Can the provisions in the Directive for checks and inspections be implemented more effectively and if so, how?

The premise is that third-country nationals want only to enter the European Union and take advantage of the resources available. The reality, however, is that many couples are separated due to migration and wish only to reunite, to be in the same place together, as a family.

Q12: Should administrative fees payable in the procedure be regulated? If so, should it be in a form of safeguards or should more precise indications be given?

Policies on administrative fees must be changed and yes, they fees should be regulated! Family reunification should not just be a right for rich families. Conditions on income, forces some parents into having to decide which child with whom to reunite. This is not conducive to the wellbeing of the family and certainly not to the child left behind. ENAR encourages that this be free! Likewise, harmonised rules are needed regarding the costs of translating documents and paying for notaries.

Q13: Is the administrative deadline laid down by the Directive for examination of the application justified?

Why should there be complexity in the application process? ENAR worries this introduction of “complexity” in cases would lead to “exceptions” on and delays in processing unwanted cases. We see no need for an extension clause. Furthermore, we are concerned about the length of the procedure already, which seems too long to keep families separated.

Q14: How could the application of these horizontal clauses be facilitated and ensured in practice?

How do you conduct an individual assessment? What certain conditions (disability, etc.) are not mentioned? This is also about guaranteeing the best interests of the child. Does Article 17 lead to better practices and guarantee the rights of the individual? According to Article 17, the Member State has to consider the particular situation of the individuals. Two retired candidates should not be denied due to age and source of their income. “Best interests” is thus a legal requirement. More case law on this issue needs to be collected, a public database for which would be useful.

3. Conclusions and recommendations

Further discussions on the scope of protection under the principle of non-discrimination, as well as the definition of “family” need to resume ensuring that fundamental rights and equality remain of central importance.

- The extended waiting period issued by Member States before a family member is permitted to unite with the sponsor is too long, as it results in keeping family members

apart for years. This tends to have negative impacts on the relationship between the sponsor and family member. ENAR urges governments to **implement more humane conditions in national legislation** that are more supportive of the well-being of the family. ENAR is convinced that when a migrant has **secure housing and income** this contributes greatly to the integration process in the country of destination. Placing conditions on housing and incomes disadvantages many migrants, who may struggle with slum landlords, attaining a good job and overcoming discriminatory tendencies to earn a decent salary. ENAR asks for benchmarks to be installed to measure the material conditions, living standards and discriminatory conditions. Newcomers may sometimes need assistance in having these basic needs met.

- Article 7 of the Directive dealt with accommodation. What about **care givers, especially in an ageing society, who live with sponsors**? Are they excluded? This is then placed in individual assessments, but harmonisation of these standards would be useful.
- The **issue of dependency** in the family reunification policies is problematic, as it links the residence permit rights of the family member to the sponsor. If a sponsor loses his/her job, becomes abusive or violent towards the resettled spouse, this negatively affects the family member. Female migrants are already more likely to experience multiple discrimination, but add an abusive spouse and dependent status on to this, and the wellbeing of the female migrant deteriorates remarkably. ENAR encourages that residence permits be granted on grounds of autonomy and that policies requiring relations of dependency among family members cease.
- ENAR encourages further reflection **what one needs to live in a family** – family members, income, shelter, and legal accommodation with signature on lease or contract, just to name a few things? This should these basic needs should be ensured. ENAR encourages that the Directive incorporate **information for children** to bring in their parents as well as more detailed information on how to become sponsor.
- ENAR encourages further reflection on the rights granted to family members under the Directive. The rights granted to the applicant in most Member States are not as generous as those accorded to EU citizens, especially regarding access to employment. This should be addressed to **ensure equality of rights** between third-country nationals legally residing in a Member State and nationals of EU Member States.

In conclusion, ENAR encourages the EU to **NOT reopen the Directive**, as this may result in further restricting the rights of migrant families. Instead, we urge Member States to **implement current provisions properly** and for the EU to **launch infringement procedures** against those Member States who fail to **comply with the Charter of Fundamental Rights** when transposing this Directive. In particular, ENAR underscores the need for Member States to **respect the principle of non-discrimination, the right to private and family life, the right to marry, and the rights of the child.**